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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. ~~372~~ 44

CLEMENTE MARTINEZ PEREZ,
Petitioner,

v.

HERBERT BROWNELL, JR.,
Attorney General of the United States of America

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Opinion Below

The findings of fact and conclusions of law of the District Court (R. 9-12) are not reported. The opinion of the Court of Appeals (R. 15-17) is reported at 235 F. 2d 364.

Jurisdiction

The judgment of the Court of Appeals was entered on July 12, 1956 (R. 18). Petition for a writ of certiorari was filed on October 10, 1956, and was granted on November 13,

1956. The jurisdiction of this Court rests on U.S.C., Title 28, Sec. 1254(1).

Statute Involved

Subsections (e) and (j) of Section 401 of the Nationality Act of 1940 (Act of October 14, 1940, c. 876, 54 Stat. 1137), as amended by the Acts of January 20, 1944 (c. 2, 58 Stat. 4), of July 1, 1944 (c. 368, 58 Stat. 677), of September 27, 1944 (c. 418, 58 Stat. 746), all as incorporated in Section 349 of the Immigration and Nationality Act of 1952 (Act of June 27, 1952, c. 477, 66 Stat. 267) (U.S.C. Title 8, Sec. 1481 (a) (5) and (10)):

> "(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by——
>
> * * * * *
>
> "(5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory:
>
> * * * * *
>
> "(10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States."

Question Presented

Are the provisions of Section 401(e) and 401(j) of the National Act of 1940, as amended, providing for the forfeiture of citizenship by a natural-born citizen of the United

States if he votes in a foreign election or remains outside of the United States to avoid military service, within the constitutional power of Congress?

Statement

Petitioner in this case seeks, pursuant to U.S.C., Title 28, Section 2201, and Title 8, Section 1503, a declaratory judgment that he is a citizen of the United States. After a hearing, the District Court denied the relief as prayed for, and adjudged that petitioner is not a national or citizen of the United States (R. 12). The court's findings of fact (R. 7-11) may be summarized as follows:

Petitioner was born in El Paso, Texas, on March 17, 1909, of Mexican-born parents. He resided there until he was 9 or 10 years old, when he went to Mexico with his parents. In 1932 he married a Mexican national, by whom he has had several children, who have always resided in Mexico. He had been informed in 1928 that his birthplace was the United States (R. 9).

In July 1943 petitioner re-entered the United States to work as a railway laborer, claiming at the time to be a Mexican. He returned to Mexico for a month in early 1944, and again re-entered the United States as a Mexican. In November, 1944, he departed to Mexico (R. 10). Petitioner knew of the duty of citizens of the United States to register under the Selective Service Laws, but did not do so (R. 10).

In July 1947 petitioner applied for admission to the United States as a United States citizen. He was held for a hearing before a Board of Special Inquiry of the Immigration Service. During the course of that hearing he admitted that he had remained outside the United States to avoid military service and that he had voted in elections in Mexico. He was ordered excluded on the ground that he

had expatriated himself, and that order was affirmed on appeal to the Board of Immigration Appeals (R. 10-11).

In June 1952 petitioner again entered the United States, as an agricultural worker, claiming that he was Mexican born. In May 1953, he presented himself to the Immigration authorities as an alien unlawfully in the United States, but claiming that he was a United States citizen and hence entitled to remain. After hearings, he was ordered deported as an alien (R. 11).

The court further found that petitioner remained outside the United States from November 1944 to July 1947 for the purpose of avoiding or evading training or service in the United States Armed Forces, and that he voted in a political election in Mexico in July 1946 (R. 11). On the basis of those findings the court concluded that petitioner had lost his United States citizenship by reason of Section 401(j) and 401(e) of the Nationality Act of 1940, as amended (R. 11-12). Judgment was entered on April 9, 1954 (R. 13).

In the Court of Appeals, petitioner did not attack the evidence, relying solely on the ground that subsections (e) and (j) of Section 401 were beyond the constitutional power of Congress. That court, relying largely upon the decision of this Court in *Mackenzie* v. *Hare*, 239 U.S. 299, affirmed the judgment on July 12, 1956 (R. 17, 18). Petition for a writ of certiorari was filed on October 10, 1956, and granted on November 13, 1956 (R. 19).

Summary of Argument

I

The present case does not present the problems heretofore dealt with by the Court in expatriation cases—the problem of the American citizen who voluntarily acquires citizenship in another country or the problem of the nat-

uralized American citizen. Petitioner here is rather a native-born American citizen who is being stripped of the American citizenship given him by the Constitution, *United States* v. *Wong Kim Ark*, 169 U.S. 649, and banished from the United States not because he has voluntarily acquired another citizenship elsewhere, but because the court has found that he did two acts which Congress in Section 401(e) and (j) of the Nationality Act of 1940, as amended, has specified to be "expatriating" acts.

The Government has heretofore sought to sustain the validity of these provisions by asserting that Congress may decree that the doing of a designated act will forfeit citizenship, and that once it has so decreed the doing of that act without duress constitutes a "voluntary" abandonment of citizenship. The argument cannot be sustained. Expatriation must be the voluntary act of the citizen, *Perkins* v. *Elg*, 307 U.S. 325, 334, and Congress cannot create a legislative presumption—particularly a conclusive one, such as it has purported to establish in Section 401(e) and (j)—that such an intention to relinquish a constitutional right exists by reason of the commission of acts to which such intention has no rational or reasonable relationship. *Bailey* v. *Alabama*, 219 U.S. 219; *Manley* v. *Georgia*, 279 U.S. 1; *Tot* v. *United States*, 319 U.S. 463; *Heiner* v. *Donnan*, 285 U.S. 312. Particularly is this true because the court will indulge every reasonable presumption against the waiver of a fundamental constitutional right. *Johnson* v. *Zerbst*, 304 U.S. 458, 464.

II

The absence of rational and reasonable relationship between the acts specified in Section 401(e) and (j) and an intention to waive or abandon American citizenship leads to an even more fundamental constitutional objection to those subsections. Even were citizenship for a native-born

American not a right granted directly by the Constitution, nonetheless the bundle of rights which constitute the rights of citizenship, including particularly the right to remain in the United States, is certainly protected from arbitrary deprivation by the Fifth Amendment. The assertion by the Government that the acts specified in Section 401(e) and (j) have a reasonable relation to the "cardinal elements of American nationality and allegiance," is either meaningless, or—if it means that any criminal or anti-social conduct may be made an "expatriating" act—proves far too much. *Mackenzie* v. *Hare*, 239 U.S. 299, which is chiefly relied upon by the Government to sustain its position, resorted to upon the common-law concept of identity of husband and wife to supply the necessary rational connection between the act of marriage to a foreigner and the voluntary renunciation of citizenship. Whether or not the case would be decided the same way today, it does not support the Government's present contention. *Savorgnan* v. *United States*, 338 U.S. 491, is equally irrelevant, for there is, without doubt, a rational connection between the act which the citizen did there—voluntary naturalization in another state—and an intent to renounce American citizenship.

III

Section 401(j) is subject to the additional constitutional objection that it imposes punishment for a crime without affording the constitutional safeguards accorded to an accused in a criminal proceeding. The act specified in that subsection, which petitioner was found to have committed, is a federal crime. Petitioner has never been indicted nor convicted of that crime, yet, as a result of the finding that he had done that act, he has had imposed on him drastic punishment.

1. The penal nature of Section 401(j) is evident from its legislative antecedents. A similar Civil War statute was

sustained as constitutional only by reading into it a requirement that the offense should first be established in a criminal proceeding. *Huber* v. *Reily*, 53 Pa. St. 112 (1866); *Kurtz* v. *Moffitt*, 115 U.S. 487, 501. That statute and Section 401(j) show such a close historical relationship that the Government in its brief at the last term in *Gonzales* v. *Landon*, No. 111, pp. 43, 61, characterized the latter as one which "reinstated, in effect", the Civil War act. It should, therefore, be subject to the same constitutional limitations recognized in *Kurtz* v. *Moffitt*, and its application to petitioner, absent a criminal conviction, held to be unconstitutional.

2. The same result follows even if Section 401(j) be considered apart from its antecedents. All of the elements of a penal statute are present. The conduct described is a federal crime. The proceedings in Congress at the time of its enactment in 1944 show that it was intended to impose a punishment for draft evasion on those who might not, because of absence from the country, be amenable to the criminal courts. The penalty which it prescribes is exceptionally severe; banishment has long been recognized as among the most drastic punishments which can be imposed. *Klapprott* v. *United States*, 335 U.S. 601, 611-612; *Schneiderman* v. *United States*, 320 U.S. 118, 122. That Section 401(j) is not labelled as a penal statute, nor loss of citizenship as punishment, is of course irrelevant. "The Constitution deals with substance, not with shadows." *Cummings* v. *Missouri*, 4 Wall. 277, 325. See also Ex parte *Garland*, 4 Wall. 333, 377; *United States* v. *Lovett*, 328 U.S. 303, 316.

ARGUMENT

This case deals with the citizenship rights of a native-born American. For such a person, as this Court declared

in *United States* v. *Wong Kim Ark*, 169 U.S. 649, 703, "citizenship [is] acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation." It is this citizenship—this constitutionally derived right—which Congress here assumes to take away.

Since citizenship is the key to all other rights guaranteed by the Constitution, citizenship is undoubtedly the most precious right of all. If it can be made forfeit for acts which Congress prescribes, all other constitutional rights may be placed beyond one's reach. Whatever the rights of an alien may be so long as he remains within the confines of the United States,[1] "his domicile here is held by a precarious tenure", being "not his right but * * * a matter of permission and tolerance". *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 586-587. See also *Galvan* v. *Press*, 347 U.S. 522, 531; *Ng Fung Ho* v. *White*, 259 U.S. 276, 280. As one recent writer has put it (Professor Harold Hurst, *Can Congress Take Away Citizenship?* 29 Rocky Mountain L. Rev. 62, 63-64 (1956)):

> "The major difference, then, between citizen and alien appears in all its stark reality when the nation withdraws its hospitality and requests the alien to withdraw or be cast out. It is the right to be here, to stay in the United States, a country where constitutional limitations make a person free from the oppressive hand of an arbitrary and tyrannical government, that gives United States citizenship its real and abiding value.
>
> * * * * *
>
> "One can hardly be said to be entitled to anything at the hands of a government if that government has the

[1] See *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 586, nn. 9, 10; 64 Yale L. J. 1164, 1166-1169 (1955).

power to cast a person out. That the nation has such power over *aliens* is now beyond question.

* * * * *

"It follows, then, that if the Congress can take away citizenship, all the rights which the citizen so firmly believes to be unalienable may vanish over the horizon, out of sight and reach of this ship which bears him into exile or returns him to some land from whose horrors and tortures he or his ancestors fled to our shores. For to take away a person's citizenship is to make him an alien, subject to deportation."

The statutory provisions here involved—subsections (e) and (j) of Section 401—do not require, and there is no finding that petitioner ever had, any intention or desire to lose this basic constitutional right. The courts below have declared it forfeit simply because petitioner did two acts —remaining out of the United States to avoid the draft, and voting in a foreign election—each of which Congress has assumed to make the *per se* basis for forfeiture of this right. We submit that Congress lacked the power to do so.

We believe the Court will be aided in considering the issues here involved by a brief summary of the historical background of expatriation in this country. This history will reveal that the concern during the early days of our history was over the question of the right of a person to renounce citizenship when he wished to do so. Problems of dual nationality, or asserted dual nationality, loomed large, and Congress, both in respect to the right of expatriation, and the methods by which it was to be accomplished, concerned itself mainly with those problems. The history will also reveal the comparatively recent development of provi-

sions which create the constitutional issue with which we are here concerned.

While, as early as 1790, Congress exercised the power granted to it by Article 1, Section 8, Clause 4, by passing a law for the acquisition of United States citizenship by naturalization (Act of March 26, 1790, c. 3, 1 Stat. 103), over 75 years went by before Congress enacted the first act recognizing the right of expatriation (Act of July 27, 1868, c. 249, 15 Stat. 223). Under the common law of England, citizenship was considered immutable—*Nemo patriam in qua natus est exuere nec ligeantiae debitum ejurare possit. Coke's Littleton,* 129(a); *Mackenzie* v. *Hare,* 239 U.S. 299; 9 Op. Atty. Gen. 356. This common law principle resulted, of course, in conflicting claims to the allegiance of individuals who became naturalized under our laws. Foreign nations claimed that naturalized Americans continued to bear responsibilities and obligations to countries to which they had renounced allegiance. The issue was a subject of controversy between the United States and Great Britain,[2] between Jefferson and Hamilton,[3] and between members of the judiciary in the various state courts.[4] This Court, in its early decisions, either avoided the issue, as in *Murray* v. *The Charming Betsy,* 2 Cr. 64, 120, and *McIlvaine*

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[2] The impressment of British seamen who had become Americans was one of the causes of the War of 1812. II Richardson, Messages and Papers of the Presidents, 485

[3] Tsiang, The Question of Expatriation in America prior to 1907, p. 28. Jefferson believed in the right of expatriation as early as 1776 (The Writings of Thomas Jefferson (Ford ed.) (Vol. X, p. 47)), and in 1779 drafted the Virginia code permitting express renunciation, in court or in a written document. Hamilton, on the other hand, believed that the right of expatriation would encourage desertion and was therefore subversive of government. IV Works of Alexander Hamilton, p. 256.

[4] The right of voluntary expatriation was explicitly denied in Massachusetts, Connecticut and New York, but implicitly affirmed in North and South Carolina and Mississippi, and recognized by statute in Pennsylvania, Virginia and Kentucky. Tsiang, *supra,* note 3, pp. 69-70.

v. *Coxe's Lessee*, 4 Cr. 208, 212, or acknowledged that expatriation might be accomplished only by mutual consent of the individual and his government. *Inglis* v. *Trustees of Sailor's Snug Harbour*, 3 Pet. 99, 125; *Shanks* v. *Dupont*, 3 Pet. 241, 246.

Attempts to legislate upon the subject of expatriation began in 1794 (4 *Annals of Congress* 1027-1031), and continued from time to time thereafter. See, e.g., 7 *Annals of Congress* 349-354; 18 *id.* 1871; 31 *id.* 495, 1030-1094, 1103-1107. Constitutional objections to the power of Congress to provide for expatriation were effectively answered by reference to the power of Congress to provide for naturalization granted by Article I, Section 8, Clause 4; no government can presume to naturalize foreigners and at the same time insist with respect to its own citizens that it is powerless to recognize a right of expatriation. See e.g., 31 *Annals of Congress* pp. 1028, 1063, 1067. In 1859, Attorney General Black advised the President (9 Op. Atty. Gen. 356, 358):

> "Among writers on public law the preponderance in weight of authority, as well as the majority in numbers, concur with Cicero, who declares that the right of expatriation is the firmest foundation of human freedom, and with Bynkershoek, who utterly denies that the territory of a State is the prison of her people."

Finally, in 1868, Congress declared that "the right of expatriation is a natural and inherent right of all people". Act of July 27, 1868, c. 249, 15 Stat. 223. Unfortunately, the act did not provide a definition of the means by which expatriation could be accomplished, and each case had to be decided on its merits, with not always consistent results. *Tsiang, supra*, note 3, p. 103; *cf. Comitis* v. *Parkerson*, 56 Fed. 556 (E.D. La., 1893).

In the years that followed, the President frequently called to the attention of Congress the need for a legislative definition of the method by which expatriation might be accomplished.[5] Finally, in 1906, a report was submitted to Congress (H. Doc. No. 326, 59th Cong., 1st Sess.) which became the basis of the Expatriation Act of 1907 (Act of March 2, 1907, c. 2534, 34 Stat. 1228). Two methods of expatriation were recognized (Sec. 2)—naturalization in a foreign state and subscription to a foreign oath of allegiance—both reflecting the need of preventing the difficulties and international complications which could result from divided allegiance voluntarily acquired. The 1907 act also provided (Sec. 3) that an American woman who married a foreigner should take the nationality of her husband —likewise, as we shall see, *infra*, pp. 29-31, a reflection of the difficulties which would result from the voluntary acquisition by an American citizen of a foreign citizenship, particularly in the light of the then prevailing concepts of the natural identity of husband and wife.

Thus the matter rested until 1933. In that year, by Executive Order, a committee consisting of the Secretary of State, the Attorney General and the Secretary of Labor was appointed to recommend a comprehensive nationality law, and in 1940, after extensive hearings (*Hearings Before House Immigration Committee on H.R. 6127, superseded by H.R. 9980*, 76th Cong., 1st Sess.), the Nationality Act of 1940 was enacted (Act of October 14, 1940, c. 876, 54 Stat. 1137). The grounds of expatriation for natural-born citizens were considerably expanded; foreign military service, foreign civil service, voting in foreign elections, renunciation before a consul abroad, and treason and desertion, after conviction thereof, were added as automatic grounds.

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[5] See annual messages of Presidents Grant, Cleveland and Theodore Roosevelt in 1873, 1874, 1885 and 1904. Richardson, *supra*, Vol. VII, pp. 239, 291, Vol. III, p. 336, Supp. 2 (Lewis) p. 851.

for expatriation. Subsection (j), with which we are here concerned, was added in 1944 (Act of September 27, 1944, c. 418, 58 Stat. 746) and in 1952 this and other changes not now relevant were incorporated into the substantial renactment of Section 401 as Section 349 of the Immigration Act of 1952 (Act of June 27, 1952, c. 477, 66 Stat. 267). By further amendment in 1954, conviction for communist activity was added as a ground of expatriation (Act of September 3, 1954, c. 1256, 68 Stat. 1146).

I

Section 401(e) and (j) Rest on a Waiver of Citizenship Fiction Which Cannot Be Constitutionally Sustained

We do not meet in this case the problem which has occupied the attention of Congress in various ways since 1790—that raised by an American citizen who voluntarily acquires citizenship in another country. For purposes of this case, at least, the Court need not consider the constitutional power of Congress to regulate and control the consequences which flow from the voluntary acquisition by an American citizen of nationality in a foreign state. We may assume, *arguendo*, that the power "inherent in sovereignty, and essential to self-preservation" which enables the Congress to regulate the entrance of foreigners and the conditions under which they shall be allowed to remain in the United States (*Fong Yue Ting* v. *United States*, 149 U.S. 698, 705), likewise enables it to regulate, and to impose conditions upon, even a native-born citizen who by his own volition acquires the status of a foreigner. "The United States has long recognized the general undesirability of dual allegiances." *Savorgnan* v. *United States*, 338 U.S. 491, 500. The nation's independence and security might be jeopardized by immunized movement of persons who,

though born in the United States, have sought and accepted citizenship in a foreign state.

This Court has referred to an alien as one who "perpetuates a dual status as an American inhabitant but foreign citizen". *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 585. One who voluntarily acquires a dual status as a native-born American but foreign citizen might be similarly viewed. The dual national, moreover, does not face the prospect of statelessness—of being a man without a country—a status which has been condemned by numerous international conferences on nationality, by Article 15 of the Universal Declaration of Human Rights, and by all recognized treatises. See 64 Yale L. J. 1164, 1195. His voluntarily acquired foreign citizenship simply becomes his sole citizenship if his American citizenship no longer exists. It is clear, however, that this "dual national" status, which may render the native-born American vulnerable to Congressional legislation depriving him of his American citizenship, must be voluntarily acquired. *Perkins* v. *Elg*, 307 U.S. 325, 329, 334. It is significant that in every expatriation case thus far considered by this Court the individual involved has either been a dual national (*Mandoli* v. *Acheson*, 344 U.S. 133; *Kawakita* v. *United States*, 343 U.S. 717; *Perkins* v. *Elg*, 307 U.S. 325), or a person who has actually acquired a foreign citizenship by performing the act which was found to have expatriated him under American law (*Savorgnan* v. *United States*, 338 U.S. 491; *Mackenzie* v. *Hare*, 239 U.S. 299).

This is not such a case. The instant petitioner has not voluntarily become a "dual national"—a quasi-citizen, quasi-foreigner—nor did he acquire such status by performing the acts which—unless the Court intervenes—will inexorably lead to his deportation.

United States v. *Wong Kim Ark*, 169 U.S. 649 dealt with

the citizenship rights of a native-born American who, as in the case with the instant petitioner, had not altered his status by acquiring a second nationality elsewhere. As to such citizens, as this Court then observed, Congress has no power to "restrict the effect of birth" (at p. 703):

> "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. * * * The simple power of the National Legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual * * *" *Osborn* v. *United States Bank*, 9 Wheat. 738, 827 [per Marshall, C. J.]. Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori* no act or omission of Congress, as to providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation. The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship."

The Government has not, so far as we are aware, asked that *Wong Kim Ark* be overruled. Nor has it challenged the statement in *Perkins* v. *Elg*, 307 U.S. 325, 334, that "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance," and that it is "voluntary action which is of the essence of the right of expatriation." Instead, it has sought, when attempting to sustain the constitutionality of the various provisions of the 1940 act which

do not deal with voluntary acquisition of another nationality, to bring those provisions within the "voluntary" concept by applying "voluntary" not to the expatriation itself, but to some other act which Congress has specified. If *that* act is done "voluntarily", then, the Government contends, the requirement of "voluntary renunciation" is met.

Before dealing with this argument, it should be made perfectly clear that the Government is *not* simply contending that one who does an act knowing that it has certain consequences is presumed to intend those consequences. In the present case there is no finding that petitioner knew that by his act of voting, or by his act of remaining in Mexico when he should have registered with a draft board in the United States, he was doing an act which Congress has said would forfeit his American citizenship. The position taken by the Government is far more sweeping. Stated in its simplest terms, it is that Congress may decree that the doing of a designated act will forfeit citizenship, and that once it has so decreed, the doing of that act without duress constitutes, *ipso facto*, a "voluntary" abandonment of citizenship.

We recognize, of course, that the right of citizenship, as well as other personal rights protected by the Constitution, may be waived. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464. "Expatriation" is defined in virtually identical fashion: "the voluntary renunciation or abandonment of nationality and allegiance." *Perkins* v. *Elg*, 307 U.S. 325, 334. We recognize, too, that voluntary renunciation or abandonment of citizenship may be inferred from the circumstances of a particular case. *Cf. Kawakita* v. *United States*, 343 U.S. 717, 727.

While we acknowledge this, we also must recognize a further principle, deep-seated in the decisions of this Court —that "waiver of constitutional rights * * * is not lightly to be inferred." *Smith* v. *United States*, 337 U.S. 137, 150. Indeed, this Court has insisted that courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson* v. *Zerbst*, 304 U.S. 458, 464. See *Emspak* v. *United States*, 349 U.S. 190, 196; *Glasser* v. *United States*, 315 U.S. 60, 70; *Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389, 393.

We believe that the argument of the Government ignores both the requirement of volition, and the strong presumption against waiver. The argument fails to recognize that what it asserts is "voluntarily" relinquished is a *constitutional* right. Citizenship of a natural-born citizen is not a right with which Congress may deal as it sees fit, in the way in which it can condition, for example, the grant of citizenship to one who becomes naturalized.[6] Natural-born citizenship stands on the same high level of protection as other rights guaranteed by the Constitution, and must be accorded the same constitutional protection.

The point can be illustrated by hypothetical legislation dealing with analogous constitutional rights. Suppose Congress were to enact the following laws:

> "In all criminal prosecutions, the voluntary surrender of the accused to the proper authorities shall be conclusive evidence of the waiver of his right to the assistance of counsel for his defense.
>
> "In suits at common law, the seeking of damages in

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[6] "The Constitution authorizes Congress 'to establish an uniform rule of naturalization' (Art. I, § 8, cl. 4), and we may assume that naturalization is a privilege, to be given or withheld on such conditions as Congress sees fit." *Schneiderman* v. *United States*, 320 U.S. 118, 131. "The power of denaturalization comes from that provision and the 'necessary and proper' Clause." *Knauer* v. *United States*, 328 U.S. 654, 673.

excess of twenty thousand dollars ($20,000) shall raise an irrebuttable presumption that plaintiff has waived the right of trial by jury.

"The failure of a person to physically resist the attempt of an officer to enter his house shall be deemed a waiver of his right against unreasonable searches and seizures."

The unconstitutionality of such laws is not open to doubt. Each of them, while purporting to establish a rule of evidence on the issue of a waiver of constitutional rights, in fact dispenses with the constitutional guarantees altogether.

Of course, where the ultimate fact to be presumed is not constitutionally protected, the statute, though cast in terms of "conclusive evidence", may be saved as a rule of substantive law, the basic fact simply displacing the presumed fact as the substantive law.[7] But where the presumed fact, to use the terminology of Dean Wigmore, is "*constitutionally preserved* as the ultimate fact on which the right or obligation depends" (4 *Wigmore, Evidence,* Sec. 1353, p. 715 (3d ed. 1940)), the rules of evidence cannot be regarded as rules of substantive law (*ibid.*):

"* * * a law providing that an assessor's or collector's deed of land sold for taxes shall be conclusive evidence that all due proceedings have been taken in the forfeiture * * * in effect provides that the property may be taken although in fact due proceedings have not

[7] "* * * to make a rule that as between successive grantees the recorder's certificate of the time of filing deeds shall be conclusive, is not to make a rule of Evidence, but merely to provide in the law of land-transfer that a deed found to be recorded as of a prior date shall take effect against a deed found to be recorded as of a subsequent date, irrespective of the actual time of entry and record. * * * the use of the term 'conclusive evidence' cannot conceal the true nature of the rule as a rule of substantive law making a certain right or obligation depend upon the existence of a certain official writing irrespective of its truth." 4 Wigmore Evidence § 1353 at 714 (3d ed. 1940).

been had,—in short, while purporting to make a rule of Evidence, it really makes a rule of Property-Law, by which certain acts are declared unnecessary which the Constitution has declared necessary."

That subsections (e) and (j) are not cast in the language of presumptions is immaterial. The statutory precursor of subsection (j), see pp. 32-35, *infra*, proclaimed that deserters and those who "go beyond the limits of the United States, with intent to avoid any draft into the military or naval service" "shall be *deemed and taken* to have voluntarily relinquished and forfeited their rights of citizenship" (italics supplied) (13 Stat. 490-491). But whatever form of words may be used, the consequence is the same, when the subsections are sought to be sustained as various means of *voluntary* renunciation or abandonment of citizenship. Necessarily, the acts which are specified in those subsections are presumed to constitute that *voluntary* waiver of a constitutional right. Such terms as "conclusive evidence" or "conclusive presumption" may be disregarded, and the statute viewed as a rule of substantive law, where no constitutional rights are involved. Similarly, a purported rule of substantive law, the constitutional validity of which is asserted to depend upon a presumption of the waiver of a constitutional right, may be analyzed and viewed as a rule of evidence.

It is apparent that when the challenged subsections are so regarded, they cannot stand. There is no rational connection between foreign voting or draft evasion by remaining outside the country and intentional, voluntary, abandonment of nationality and citizenship. That rational connection being absent, the statutory presumption violates due process.

It does not suffice to demonstrate a rational connection to speak of draft evasion by leaving the country as "in-

consistent with good citizenship" or "contrary to the obligations of citizenship". Indeed, as we show below, pp. 37-39, it is highly doubtful that the provisions of Section 401(j) were ever thought of by Congress as resting on any such basis. We agree, of course, that draft evasion is both of these, but so is draft evasion without leaving the country, tax evasion, avoidance of jury service, fleeing the country to escape trial for murder, failure to vote, and a host of other acts. Surely the failure in any of these ways to meet standards of good citizenship or the obligations of citizenship cannot be rationally equated with an intention to abandon citizenship altogether.

We realize, of course, that draft evasion is dishonorable and disgraceful, whether or not it is, as it may be, the product of either fear or ignorance or both. But as a federal court recently observed in holding that a native-born American had not "expatriated" himself, "The Government does not restrict its solicitude to stout-hearted men. The timid, the weak and the ignorant are equally entitled to protection." *Tomasicchio* v. *Acheson*, 98 F. Supp. 166, 174 (D.D.C. 1951).

Nor does voting in a foreign political election have a rational connection with the voluntary relinquishment of American citizenship such as to justify its designation as an "expatriating" act. Were a foreign state to limit the right to vote to those who have become citizens of that foreign state, or condition voting upon acceptance of such citizenship, voting by an American in that state might create the same problem of voluntary assumption of dual nationality for which Congress has provided in other connections.[8]

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[8] Compare, for example, the provisions of Section 401(d) (U.S.C., Title 8, Sec. 1481(a)(4)(B), quoted in the Appendix *infra*, p. 47), which provides for loss of citizenship by accepting employment from a foreign government if the position requires an oath of allegiance to the foreign state.

But there is no such limitation in the present act and no such situation in the present case—a vote in a foreign political election, *ipso facto,* suffices.

It is apparent that, standing alone, voting in a foreign election evidences no more than some interest in the affairs of one's inhabitance. Yet, under this act, citizenship is "voluntarily" renounced by reason of a vote in a local Canadian election on whether beer or wine should be sold. Matter of F —, 2 I.&N. Dec. 427; *cf.* Matter of P—, 1 I.&N. Dec. 267. Indeed, it is apparent that in many instances voting in a foreign election may evidence a high regard for the interests of the United States, and may be an act of which the United States is, and is intended to be, a direct beneficiary. In *Kazdy-Reich* v. *Marshall,* 88 F. Supp. 787 (D.D.C. 1950), the "expatriating" act of foreign voting was motivated by a desire to aid American foreign policy and to defeat the Communists. Yet the Court, applying inexorably a statute which puts blinders on its eyes, decreed that the foreign voting must be deemed to have established a "voluntary" abandonment of American citizenship. *Cf. Bisceglia* v. *Acheson,* 196 F. 2d 865, 866 (D.C. Cir. 1952).[9] Indeed, the lack of correlation between voting in a foreign election, and a voluntary abandonment of

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[9] In a speech on "Some Nationality Problems" delivered on May 20, 1950, to the Fifth National Conference on Citizenship (see Washington Evening Star May 21, 1950, p. A-21) Mrs. Ruth Shipley, Chief of the Passport Division of the Department of State, referring, *inter alia,* to the statutory provisions for expatriation by voting in a foreign election, which she referred to as "relating to the involuntary loss of nationality", said:

> "Any of these acts may not be inconsistent with devotion and loyalty to America and the principles for which it stands. * * * Take voting.—In Denmark and in Norway all possible votes were necessary to turn elections against the Nazis; in Italy, votes of Italian-Americans helped to save that country from the devastating rule of communism; in Hungary and Roumania, and I have no doubt in other countries, voting saved many from starvation by enabling them to keep their food ration cards. Yet these people lost their greatest treasure—American citizenship."

citizenship, is strikingly evident in the fact that nowhere else in the world is it made an "expatriating" act.[10]

We submit that even had Congress done no more than to create a rebuttable presumption that either of the acts described in Section 401(e) and (j) evidenced the voluntary waiver of citizenship—had made the specified acts no more than *prima facie* proof of voluntary renunciation—that presumption could not be squared with the prior decisions of this Court. In *Bailey* v. *Alabama*, 219 U.S. 219, the Court struck down a statute which made the failure to perform certain contracts of service *prima facie* evidence of an intent to injure or defraud. The Court observed that the "asserted difficulty of proving the intent to injure or defraud is thus made the occasion for dispensing with such proof, so far as the *prima facie* case is concerned." (219 U.S. at 234). The Court continued (pp. 235, 238):

> "The 'difficulty,' which admittedly the amendment was intended to surmount, did not exist where natural inferences sufficed. Plainly, the object of the statute was to hit cases which were destitute of such inferences, and to provide that the mere breach of the contract and the mere failure to pay the debt might do duty in their absence.
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[10] Laws Concerning Nationality (U.N. Leg. Ser. 1954). The statement in the text should perhaps be qualified by reference to the laws of Andorra, which provide for expatriation for the "exercise of foreign political rights" which may include voting.

This United Nations study, which covers the laws of 83 nations, reflects the length to which the United States has attempted to go to deprive native-born Americans of their birthright. We have more statutory grounds for expatriation of native-born citizens than any other country in the world. Not only are we the only country (possibly excepting Andorra) to expatriate upon the ground of participation in a foreign election, but we share with only four other countries (Bulgaria, Greece, Poland and Turkey) expatriation for draft evasion, and in one of these (Turkey) expatriation is permissive rather than mandatory.

> "We cannot escape the conclusion that, although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt; and judging its purpose by its effect, that it seeks in this way to provide the means of compulsion through which performance of such service may be secured."

In *Manley* v. *Georgia*, 279 U.S. 1, this Court branded as "unreasonable and arbitrary" a state statute which read (279 U.S. at pp. 3-4):

> "Every insolvency of a bank shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one (1) year nor longer than ten (10) years; provided, that the defendant in a case arising under this section, may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe."

The terse comment of the Court was (279 U.S. at p. 7):

> "The connection between the fact proved and that presumed is not sufficient. Reasoning does not lead from one to the other. *Hawes* v. *Georgia*, 258 U.S. 1, 4. The presumption created * * * is unreasonable and arbitrary."

Again in *Tot* v. *United States*, 319 U.S. 463, this Court overturned, as lacking the requisite "rational connection between the fact proved and the ultimate fact presumed" (319 U.S. at p. 467), a federal statute which provided (319 U.S. at p. 464):

"It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act."

Said the Court (319 U.S. at pp. 467-468):

"Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the act proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience * * * where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts."

The inference of "expatriation"—voluntary renunciation of American citizenship—from either draft evasion by leaving or remaining outside of the country or foreign voting is similarly "arbitrary because of lack of connection between the two in common experience". It is similarly "so strained as not to have a reasonable relation to the circumstances of life as we know them". There is no greater connection between such draft evasion or foreign voting and "expatriation" than there is between the failure to perform a contract for services and the presumption of intent to defraud one's employer, struck down in *Bailey* v. *Alabama*, *supra;* or between the insolvency of a bank and

the presumption of fraudulent practices on the part of the bank's president and directors, struck down in *Manley* v. *Georgia, supra;* or between a convict's possession of firearms and ammunition and the presumption that they were received via interstate shipment, struck down in *Tot* v. *United States, supra.*

Under these decisions, there must be a rational connection between the fact proved (*e.g.*, voting in the foreign election) and the ultimate fact presumed (voluntary renunciation or abandonment of citizenship), even where the presumption is not conclusive but one establishing a *prima facie* case. Here, however, the presumption of voluntary action sought to be created by subsections (e) and (j) of Section 401 cannot be overcome by the most overwhelming proof to the contrary. Regardless of the actualities of the particular case, it is conclusive. Here, then, even were it possible to say that a rational connection existed between the fact proved and the ultimate face presumed, the sections would nonetheless violate the due process clause of the Fifth Amendment. A presumption must "not shut out from the party affected a reasonable opportunity to submit * * * in his defense all of the facts bearing upon the issue." *Mobile, J. & K.C. R.R.* v. *Turnipseed*, 219 U.S. 35, 43.

Heiner v. *Donnan*, 285 U.S. 312, is the classic example. There, in order to prevent evasion of inheritance taxes, Congress provided that gifts made within two years of the donor's death were to be deemed to have been made in contemplation of death. The Court recognized that Congress might create a rebuttable presumption—*i.e.*, that a rational connection existed between the fact proved and the ultimate fact presumed—but when it was made "incapable of being overcome by proof of the most positive character," (285 U.S. at p. 324), it was stricken down under the Fifth Amendment. The Court said (285 U.S. at p. 329):

"* * * whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality. * * *

* * * * *

"If a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law."

See also *Schlesinger* v. *Wisconsin,* 270 U.S. 230.

Where the presumed fact is "constitutionally preserved", the use of conclusive presumptions cannot be used as a means of escape from constitutional restrictions. Dean Wigmore, whose approach toward statutory presumptions generally, as another eminent authority has observed, "is simply and directly that 'the sky is the limit'" (*McCormick on Evidence,* Sec. 313, at p. 655 (1954)), recognizes that to "the question whether the Legislature can constitutionally oblige the Judiciary to forego its own investigation * * * the answer can hardly be doubtful" (4 Wigmore Sec. 1353 at pp. 715-716):

"The judicial function under the Constitution is to apply the law in controverted cases; to apply the law necessarily involves the determination of the facts; to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the exercise of an indestructible judicial function.

"Hence, to make a rule of conclusive evidence, com-

pulsory upon the Judiciary, is to attempt an infringement upon their exclusive province."

We must reiterate that we are *not* dealing with a situation in which Congress has undoubted power to declare substantive law. We are dealing with a right which is accorded by the Constitution. *United States* v. *Wong Kim Ark*, 169 U.S. 649; *Perkins* v. *Elg*, 307 U.S. 325. The ultimate fact upon which alone the loss of citizenship must rest (apart from the problems involved in the voluntary acquisition of foreign citizenship) is *voluntary* abandonment. What we urge is that it is wholly beyond the power of Congress to enact a statute which, in effect, conclusively presumes that voluntary abandonment from the doing of another act which, in common experience, has no rational connection to such a waiver or abandonment. That is simply taking away native-born citizenship involuntarily. That, we believe, may not be done under our Constitution.

II

The "Expatriating" Acts Specified in Sections 401(e) and (j) Are Not Even Sufficiently Connected With Expatriation to Meet the Minimum Standards of Due Process.

In Point I, *supra*, we have dealt with the contention that petitioner may be said to have "voluntarily" waived his right to American citizenship by reason of having committed, voluntarily, acts which have been designated as expatriating acts, *per se*. That argument has been made first, because it appears to be the principal basis upon which the validity of the challenged subsections is sought to be maintained.

We believe, however, that there is an even more fundamental constitutional infirmity to which Sections 401(e) and (j) are subject. Even if citizenship for a native-born

American were not a right directly granted by the Constitution, nonetheless the right to remain in the United States certainly falls within the rights guaranteed against arbitrary deprivation by the "life, liberty or property" clause of the Fifth Amendment. We believe that Sections 401(e) and (j) violate that provision of the Constitution.

The Government does not appear to contend that Congress can make any act which an individual might perform an "expatriating" act. Heretofore, at least, it has conceded that the limits imposed upon Congress—presumably by the Fifth Amendment—require that the "expatriating" act must meet a "reasonable connection" test. Last term, in a case involving Section 401(j) (*Gonzales* v. *Landon*, No. 111) (in which the Court did not reach the constitutional issue, 350 U.S. 920), the Government asserted (Br. for Resp., p. 57):

> "The only generalization we would offer is that the act of expatriation must have such a close connection with the cardinal elements of American nationality and allegiance that it is reasonable, with due consideration for the 'cherished status' of American citizenship (*Knauer* v. *United States*, 328 U.S. 654, 658), for Congress to impose loss of nationality as a result of the commission of the act".

We submit that the subsections of Section 401 do not meet this standard. We need not repeat here what we have already pointed out above—the lack of any rational connection between the "expatriating" acts specified in Sections 401(e) and (j) and what the Government calls "the cardinal elements of American nationality and allegiance." Draft evasion by leaving the country no more evidences expatriation than do a hundred other offenses. The crossing of the Rio Grande or the Canadian border by a draft-dodger no more demonstrates an intention to forfeit Amer-

ican nationality than does the crossing of the same boundaries by a kidnapper with his victim, or by a merchant in the course of his black market dealings. No doubt the extreme sanction of banishment is an effective sanction to punish draft dodging. Indeed, that Congress intended to inflict punishment, as we show in Point III, *infra*, emphasizes the real absence of any rational connection between the offense described in subsection (j) and the voluntary and intentional forfeiture of citizenship. But banishment could be equally effective in punishing income tax evasion, or the smuggling of firearms or untaxed liquor, or leaving the country to avoid a Congressional subpoena. Unless the Government means that anyone who commits a crime can rationally be said to intend that his American citizenship may be forfeit, the contention of the Government is meaningless. And if the Government does mean that the "cherished status" of American citieznship derives no more protection than that from the Constitution, its position must be rejected. See Hurst, *supra*, at 66-67 (1946).

The same thing can be said of voting in a foreign election. Voting, without more— and it has to be without more since the courts are not permitted to inquire into circumstances, motivations or consequences—is no more than a "neutral" act. Indeed, as we have pointed out above (pp. 20-22), there are many situations in which voting in a foreign election is an act which may evidence a high regard for American allegiance.

It will be urged, no doubt, that whatever may be the validity of this position as an original proposition, the law has been settled the other way by *Mackenzie* v. *Hare*, 239 U.S. 299. Voting in a foreign election, and draft evasion by leaving the country, it will be said, are no more remote from "the cardinal elements of American nationality and allegiance" than marriage to a foreigner.

We believe that the argument misconceives the nature and scope of the decision in that case. Congress had declared,

by Section 3 of the Act of March 2, 1907 (c. 2534, 34 Stat. 1228) that "any American woman who marries a foreigner shall take the nationality of her husband." The Court, it is clear, upheld the validity of that provision by reason of the common-law concept of husband and wife (239 U.S. at p. 311):

> "The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental nor arbitrary, and worked in many instances for her protection. There has been, it is true, much relaxation of it but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband. It has purpose, if not necessity, in purely domestic policy; it has greater purpose, and, it may be, necessity, in international policy. And this was the dictate of the act in controversy."

The court was specific in recognizing (p. 311) that it was not dissenting from the language of the opinion in *United States* v. *Wong Kim Ark*, 169 U.S. 649, 703. It conceded (*ibid.*) that a change in citizenship cannot be imposed without the concurrence of the citizen. But in view of the concept of the merger of identity of husband and wife which then prevailed, the Court found the statute to be (p. 312) "one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid, but demanded."

The change which forty years has wrought in the status of women—including the passage of the Nineteenth Amendment—would certainly call for a careful re-examination of the decision in *Mackenzie* v. *Hare* were it to arise again today. One need cite no further proof than that such legis-

lation, being no longer "demanded" by international considerations, has been repealed.

Nor is the Government aided by *Savorgnan* v. *United States*, 338 U.S. 491. Not only did Mrs. Savorgnan marry a foreigner, an Italian Vice Consul, but she formally and knowingly applied for and obtained foreign citizenship. As the Court noted (p. 498):

> "From the beginning, one of the most obvious and effective forms of expatriation has been that of naturalization under the laws of another nation."

The Court had little difficulty in concluding that voluntary acceptance of a foreign citizenship was enough (p. 502):

> "The petitioner, in the instant case, was a competent adult. She voluntarily and knowingly sought and obtained Italian citizenship. Her application for naturalization and her oath of allegiance were in Italian, which she did not understand, but Savorgnan did understand Italian, and he was with her and able to translate and explain them to her when she signed them. She knew that the instruments related to her citizenship and that her signature of them was an important condition upon which her marrigae depended."

Under the circumstances, we do not think the Court was too unkind when it later characterized Mrs. Savorgnan's conduct as "sign[ing] one thing and claim[ing] another". *Moser* v. *United States*, 341 U.S. 41, 47.

III

Section 401(j) Is Also Invalid Because It Imposes a Criminal Penalty Without Appropriate Constitutional Safeguards.

Section 401(j), which makes draft evasion by leaving the United States an expatriating act, is subject to an addi-

tional constitutional objection—that it imposes a punishment for a crime without affording the accused his constitutional rights of grand jury indictment, trial by jury, compulsory process for witnesses, and the like. Unlike the lawful acts of marriage and naturalization in a foreign country, which were involved in *Mackenzie* v. *Hare*, 239 U.S. 299, and *Savorgnan* v. *United States*, 338 U.S. 491, draft evasion under both the Selective Service Acts of 1940 (c. 720, 54 Stat. 894, 50 U.S.C. App. Sec. 311 (1946)) and 1948 (c. 625, 62 Stat. 622, 50 U.S.C. App. Sec. 462 (1952)) is a federal crime. Petitioner, here, has never been indicted nor convicted of that crime, yet he has had imposed on him for that offense the drastic punishment of loss of citizenship and banishment. We believe that this is beyond the constitutional power of Congress.

1. Section 401(j) has a long, separate history of its own, going back almost a century. Its earliest prototype is found in the Act of March 3, 1865, c. 79, 13 Stat. 490, which provided:

> "Sec. 21. *And be it further enacted*, That, in addition to the other lawful penalties of the crime of desertion from the military or naval service, all persons who have deserted the military or naval service of the United States, * * * shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship * * * and all persons who shall hereafter desert the military or naval service, and all persons who, being duly enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States, with intent to avoid any draft into the military or naval service, duly ordered, shall be liable to the penalties of this section. * * * "

This statute promptly came before the courts in controversies over the right of violators to vote. The first, and leading, case under the act was *Huber* v. *Reily*, 53 Pa. St. 112 (1866), decided by Judge (later Mr. Justice) Strong. After noting that the act is "highly penal" and that it adds forfeiture of citizenship as an additional penalty to the offense described, Judge Strong concluded that the penalty could not be imposed without providing the constitutional safeguards given the accused in a criminal proceeding. Although the act made no provision for a trial and conviction of desertion or draft evasion, the court saved the statute by construing it to require that the offense charged should first be established in a criminal proceeding. His language is highly relevant here (53 Pa. St. at pp. 117-119, 120):

> " * * * I can call to mind no instance in which it has been held that the ascertainment of guilt of a public offence and the imposition of legal penalties, can be in any other mode than by trial according to the law of the land or due process of law * * * administered by a judicial tribunal authorized to adjudicate upon it. And I cannot persuade myself that a judge of elections or a board of election officers constituted under state laws is such a tribunal * * *. Even if * * * they were to decide that he had not forfeited his citizenship, all this would not amount to an acquittal. It would not protect him against a subsequent similar accusation and trial * * *. Surely that is no trial by due process of law, the judgment in which is not final, decides nothing, but leaves the accused exposed to another trial in a different tribunal, and to the imposition by that other tribunal of the full punishment prescribed by law.
>
> * * * * *

> "It [the act] means that the forfeiture which it prescribes, like all other penalties for desertion, must be *adjudged* to the convicted person, after trial by a court-martial, and sentence approved."

The decision was later approved, and its result adopted by this Court. *Kurtz* v. *Moffitt*, 115 U.S. 487, 501. See also *State* v. *Symonds*, 57 Maine 148, 150 (1869); *Severance* v. *Healey*, 50 N.H. 488 (1870); *Gotcheus* v. *Matheson*, 61 N.Y. 420 (1870).

Section 401(j) is the lineal descendant of this 1865 act.[11] In 1912, the 1865 act was amended to make it inapplicable in time of peace (Act of August 22, 1912, c. 336, 37 Stat. 356), but it remained on the statute books until it was repealed, on the eve of World War II, by Section 504 of the Nationality Act of 1940 (Act of October 14, 1940, c. 876, 54 Stat. 1172). One part of its provisions, relating to desertion in time of war, was reenacted in Section 401(g) of the 1940 Act.[12] Section 401(g), however, made explicit the requirement of prior criminal conviction which the courts had read into the 1865 statute.

The failure of the 1940 act to continue draft evasion, in addition to desertion, as an expatriating act led to the

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[11] No case arising under the 1865 act involved an attempt to deport a violator of its provisions. Indeed it is not clear whether deprivation of the "rights of citizenship" simply imposed loss of civil rights or loss of nationality as well. See Roche, The Loss of American Nationality, 99 U. Pa. L. Rev. 25, 26, 61-62 (1950); Comment, 64 Yale L. J. 1164, 1171 n. 38, 1178 n. 77 (1955). That it involved "rights of citizenship" rather than citizenship itself is strongly indicated by the fact that it was pitched in terms of "voluntary" relinquishment and forfeiture of the rights of citizenship, while it was not until three years later that Congress for the first time recognized the right of expatriation. Act of July 27, 1868, c. 249; 15 Stat. 223. The modern version of the 1865 act may thus be far more harsh than its Civil War predecessor. See 64 Yale L. J. 1164, 1180, n. 89.

[12] See the discussion of the Cabinet Committe report in Hearing before the House Committee on Immigration and Naturalization on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess. pp. 491-492.

addition of Section 401(j) in 1944. The Civil War act, as amended, was referred to by the authors of the bill as justification for the measure (see, *e.g.*, Congressman Dickstein, 90 Cong. Rec. 3261). Indeed, the Government itself has described Section 401(j) to this Court as a provision which "reinstated, in effect" the act of 1865. See Brief for Respondent in *Gonzales* v. *Landon*, No. 111, October Term, 1955, pp. 43, 61.

There can be no doubt that the 1865 act was a penal measure. Nor can there be doubt that loss of citizenship under that act could not be imposed as a penalty unless trial and conviction of the offenses which it described had first been had. *Kurtz* v. *Moffitt*, 115 U.S. 487, 501; *Huber* v. *Reily*, 53 Pa. St. 112 (1866). The result, under Section 401(j), must be the same. Since petitioner here has never been convicted of the crime for which he is being punished by forfeiture of citizenship, that penalty may not be constitutionally imposed upon him.

2. We need not, however, rely exclusively on this close historical link between the act of 1865 and the present Section 401(j), highly persuasive though it be. Even were Section 401(j) devoid of antecedents, it is apparent that it was intended to be, and is, a statute which imposes "punishment" for a "crime". If that be so, it is plainly not within the power of Congress to provide that such a punishment should be assessed without the usual safeguards provided by the Constitution—trial by jury, for example—none of which was available to petitioner.[13]

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[13] Because there have been no criminal proceedings whatever in this case, we need not consider the further question whether deprivation of citizenship followed by banishment, which the present petitioner faces, would constitute cruel and unusual punishment within the meaning of the Eighth Amendment. See Comment, 64 Yale L.J. 1164, 1187-1194. The issue was not resolved by the 1865 Act, since deprivation of the "rights of citizenship" pursuant to criminal conviction under that statute had never been followed by an attempt to banish the offender. Nor need

We may appropriately start with the definition of a crime as given in Blackstone (4 Commentaries, p. *5):

> "A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. * * *.
>
> "The distinction of public wrongs from private, of claims and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity."

That avoidance or evasion from military service is a "public wrong" and "a breach and violation of the public rights and duties, due to the whole community," when the whole community is preparing to battle for its own self-preservation, cannot seriously be denied. Nor can the fact that such conduct is "an act committed, or omitted in violation of a public law". Section 11 of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 894, 50 U.S.C. App. Sec. 311 (1940), in effect when petitioner was found to have evaded the draft,[11] declared that any person who

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we dwell on whether Section 401(j) violates due process in that it improperly discriminates in the penalty imposed upon one who evades the draft but confines his evasion to the forty-eight states, and one who happens to go beyond these boundaries, although it may well be said, as in *Skinner* v. *Oklahoma*, 316 U.S. 535, 541, that "the law lays an unequal hand on those who have committed intrinsically the same quality of offense."

[11] Virtually identical language is contained in Section 12 of the Selective Service Act of 1948, c. 625, 62 Stat. 622, 50 U.S.C. App. Sec. 462 (1952).

> "evades registration or service in the land or naval forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this Act * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment * * *."

This, of course, makes the expatriating act of draft evasion a federal felony. U.S.C., Title 18, Sec. 1.

Courts and commentators have indicated that the crucial elements in determining whether a statute is "criminal", and its santcion "punishment", is penal intent on the part of the legislature and the severity of the sanction. See, *e.g.*, *United States* v. *Lovett*, 328 U.S. 303; *Ex parte Garland*, 4 Wall. 333; Wormuth, *Legislative Disqualifications as Bills of Attainder*, 4 Vand. L. Rev. 603, 608-610 (1951); Comments, 64 Yale L. J. 712, 722-724 (1955), 64 Yale L. J. 1164, 1180-1182 (1955). On both grounds, Section 401(j) is a penal statute.

There can be no real doubt as to the intention of Congress that Section 401(j) was to impose a punishment for an offense against the United States. The Chairmen of both of the committees of Congress who considered the bill, and the Attorney General who recommended it, made clear that punishment for draft evasion, and not any idea that draft evasion evidenced an intention to abandon citizenship, was the motivation behind the bill. Thus Senator Russell, Chairmain of the Senate Committee on Immigration, said on the floor of the Senate (90 Cong. Rec. 7629 (1944):

> "* * * I do not see how anyone could object to such a bill. An alien who remains in the country and refuses to serve in the armed forces in time of war is prosecuted under our laws, and if found guilty he is

compelled to serve a term in the penitentiary. Under the terms of the Selective Service Act an American citizen who refuses to serve when he is called upon to do so is likewise subject to a prison term. Certainly those who, having enjoyed the advantages of living in the United States, were unwilling to serve their country or subject themselves to the Selective Service Act, *should be penalized in some measure.* This bill would deprive such persons as are citizens of the United States of their citizenship, and, in the case of aliens, would forever bar them from admission into the United States. Any American citizen who is convicted of violating the Selective Service Act loses his citizenship. This bill would merely *impose a similar penalty* on those who are not subject to the jurisdiction of our courts * * *." (Italics supplied.)

On the House side, Congressman Dickstein, who introduced the bill and was Chairman of the House Committee on Immigration and Naturalization which reported it to the House, said (90 Cong. Rec. 3261-3262 (1944)):

"I would classify this piece of legislation as a bill to denaturalize and denationalize all draft dodgers who left this country knowing that there was a possibility that they might be drafted in this war and that they might have to serve in the armed forces, in the naval forces, or the marines, and in an effort to get out of such service.

* * * * *

"I want to say again that I compliment the Department of Justice for calling this matter to the attention of the committee of which I have the honor to be chairman. Any man, any American, who leaves this country

for the purpose of not serving his country in time of war *is a traitor,* in my judgment.

* * * * *

"* * * there are a lot of people, native-born as well as naturalized, who have left the country for this purpose and I say that they have no right to retain their citizenship or to be allowed to return. I say their papers and their citizenship ought to be taken away from them.

* * * * *

"* * * It seems to me that persons in that category should not be allowed to call themselves Americans or should not be allowed to be citizens of the United States of America." (Italics supplied.)

And in urging the legislation, the Attorney General said (S. Rep. No. 1075, 78th Cong., 2d Sess., p. 2):

"* * * Persons who are unwilling to perform their duty to their country and abandon it during its time of need are much *less worthy of citizenship* than are persons who become expatriated on any of the existing grounds." (Italics supplied.)

Penal intent—intent to punish for an offense—seems apparent. And certainly, when one turns to the other criterion —the severity of the penalty—the penal nature of Section 401(j) is equally clear. Unless this Court intervenes, a native-born American will be subjected to the penalty of banishment, perhaps as severe a penalty, short of death, as can be imposed. Banishment and related sanctions have deep roots in history as severe and unusual punishment. As Blackstone has noted (1 Comm. * 138):

"* * * no power on earth, except the authority of parliament, can send any subject of England *out* of the land against his will; no, not even a criminal. For exile and transportation are punishments at present unknown to the common law; and, whenever the latter is now inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or else by the express direction of some modern act of parliament. To this purpose the great charter [c. 29] declares, that no free man shall be banished, unless by the judgment of his peers, or by the law of the land."

See also 4 *Bl. Comm.* *377. And as another author states (Wines, *Punishment and Reformation* (1910) pp. 85, 86):

"* * * exile * * * is essentially an alternative for the death sentence, and has the same effect, so far as the community which desires to rid itself of a culprit is in question. Banishment may * * * be compulsory, or by legal fiction, it may be voluntary, the criminal being liable to execution if he remains at home. It was by this subterfuge that transportation was instituted, as we shall see in a subsequent chapter. * * * The Romans divided banishment into deportation and relegation; deportation was exile to a place specified, from which the banished were not allowed to depart; but relegation was simple exile, and did not involve loss of citizenship. A form of banishment called ostracism * * * existed at Athens * * * it was inflicted by popular suffrage at a special election * * *. Ostracism did not involve the confiscation of the exile's estate, as the ordinary form of banishment did * * * the mind dislikes to dwell upon acts of violence, such as have been described in this dark chapter of human nature at its worst."

The severity of punishment of this sort has likewise been noted by this Court. In *Klapprott* v. *United States*, 335 U.S. 601, while acknowledging that "denaturalization proceedings have not fallen within the technical classification of crimes"—for reasons peculiar to the plenary Congressional power over aliens which have no application to the case of a native-born American [15]—the Court observed (pp. 611-612):

> "Denaturalization consequences *may be more grave than consequences that flow from conviction for crimes* * * *. This Court has long recognized the plain fact that to deprive a person of his American citizenship is an *extraordinarily severe penalty* * * *. As a result of the denaturalization here, petitioner has been ordered deported. 'To deport one who so claims to be a citizen, obviously deprives him of liberty * * *. It may result also in loss of both property and life; or of all that makes life worth living' *Ng Fung Ho* v. *White*, 259 U.S. 276, 284." (Italics supplied.)

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[15]The technical exclusion of alien deportation from classification as punishment for crimes is based on the view first articulated in *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730, which carefully excepted *citizens* from its reasoning:

> "The order of deportation [of an alien] is not a punishment for crime. *It is not a banishment in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment.* It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application." (Italics supplied.)

In *Schneiderman* v. *United States*, 320 U.S. 118, the Court said of the deprivation of the "priceless benefits" that derive from the status of American citizenship (320 U.S. at p. 122):

> "In its consequences it is *more serious than* a taking of one's property, or *the imposition of a fine or other penalty*. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance." (Italics supplied.)

Only recently the Court noted that even as to naturalized citizens the constitutional validity of banishment "might be debatable" as an original proposal, but sustained it because it had been "considered closed for many years and a body of statute and decisional law has been built" upon it. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594. This Court, of course, is not similarly restricted by history as to native-born citizens. A harsh doctrine, "debatable" but for history, is not lightly to be extended in an area of cherished and fundamental rights.

That Section 401(j) does not *label* the loss of citizenship for draft evasion a "punishment" or "penalty" is unimportant. Sanctions far less severe than de-citizenship and banishment have been held to be "punishment" though not so designated by Congress. As the Court said in *Cummings* v. *Missouri*, 4 Wall. 277, 325:

> "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. * * * If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

In the *Cummings* case, the Court classified disqualification from state office and various professions as "punishment" (4 Wall. at pp. 320-322):

> "The disabilities created by the constitution of Missouri must be regarded as penalties—they constitute punishment. * * *. The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.
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> * * * * *
>
> "'Some punishments,' says Blackstone, 'consist in exile or banishment, by abjuration of the realm or transportation; others in loss of liberty by perpetual or temporary imprisonment. Some extend to confiscation by forfeiture of lands or movables, or both, or of the profits of lands for life; others induce a disability of holding offices or employments, being heirs, executors, and the like.'" [4 *Bl. Comm.* *44]
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> * * * * *
>
> "The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined."

Ex parte *Garland*, 4 Wall. 333 is to the same effect (at p. 377):

> "The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. Any exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."

The principles of these decisions was recently applied in *United States* v. *Lovett*, 328 U.S. 303, 316:

> "This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type. It is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes, such as treason, * * *.
>
> "Section 304, thus, clearly accomplishes the punishment of named individuals without a judicial trial. The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal."

We submit, therefore, that having regard to substance rather than form, Section 401(j) must be classified as a criminal statute, and the deprivation of citizenship which it purports to exact as a punishment for draft evasion by leaving the United States as criminal punishment. Whether it can be saved, as was its Civil War prototype, by reading into it a requirement of a prior criminal conviction, and

whether, if it were to be so saved it would be subject to other fatal constitutional objections (see p. 35, n. 13, *supra*) are questions we need not now consider. Petitioner, in any event, has not been tried or convicted in any sort of criminal proceeding, and cannot, therefore, be punished.

Conclusion

We submit, therefore, that Subsections (e) and (j) of Section 401 should be held invalid as in conflict with the Constitution, and that the decision of the court below should be reversed and the case remanded for such further proceedings as may be appropriate in the light of that determination.

Respectfully submitted,

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APPENDIX

Section 401 of the Nationality Act of 1940 (Act of October 14, 1940, c. 876, 54 Stat. 1137), as amended by the Acts of January 20, 1944 (c. 2, 58 Stat. 4); of July 1, 1944 (c. 368, 58 Stat. 677), of September 27, 1944 (c. 418, 58 Stat. 746), all as incorporated in Section 349 of the Immigration and Nationality Act of 1952 (Act of June 27, 1952, c. 477, 66 Stat. 267), and as further amended by the Act of September 3, 1954 (c. 1256, 68 Stat. 1146) (U.S.C., Title 8, Sec. 1481), is as follows:

"(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—

"(1) obtaining naturalization in a foreign state upon his own application, upon an application filed in his behalf by a parent, guardian, or duly authorized agent, or through the naturalization of a parent having legal custody of such person: *Provided*, That nationality shall not be lost by any person under this section as the result of the naturalization of a parent or parents while such person is under the age of twenty-one years of age by a parent, guardian, or duly authorized agent, unless such person shall fail to enter the United States to establish a permanent residence prior to his twenty-fifth birthday: *And provided further*, That a person who shall have lost nationality prior to January 1, 1948, through the naturalization in a foreign state of a parent or parents, may, within one year from the effective date of this chapter, apply for a visa and for admission to the United States as a nonquota immigrant under the provisions of section 1101 (a) (27) (E) of this title; or

"(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof; or

"(3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such

entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense: *Provided*, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday; or

"(4) (A) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, if he has or acquires the nationality of such foreign state; or (B) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, for which office, post, or employment an oath, affirmation, or declaration of allegiance is required; or

"(5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

"(6) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

"(7) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or

"(8) deserting the military, air, or naval forces of the United States in time of war, if and when he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military, air, or naval forces: *Provided*, That, notwithstanding loss of nationality or citizenship under the terms of this chapter or previous laws by reason of desertion committed in time of war,

restoration to active duty with such military, air, or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military, air, or naval authority shall be deemed to have the immediate effect of restoring such nationality or citizenship heretofore or hereafter so lost; or

"(9) committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction; or

"(10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the president to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

"(b) Any person who commits or performs any act specified in subsection (a) of this section shall be conclusively presumed to have done so voluntarily and without having been subjected to duress of any kind, if such person at the time of the act was a national of the state in which the act was performed and had been physically present in such state for a period or periods totaling ten years or more immediately prior to such act."